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No. 02-322

In the Supreme Court of the United States

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner

v.

CITY OF CHICAGO,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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42 pp

QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database), and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA represents the interests of its members, including both consumers and federally-licensed firearm dealers, with respect to the application of federal statutes which protect such members' privacy interests.[1] These interests are not adequately

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[1] No counsel for any party to this case authored this brief in whole or in part and no person or entity other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. This

advanced by the Petitioner Department of the Treasury.

SUMMARY OF ARGUMENT

This case implicates the privacy interests of millions of American firearm owners. The court below held that "one does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). It opined that the identities of persons who lawfully purchase more than one handgun in a five-day period, and of persons whose names appear in firearm trace records, must be disclosed under the Freedom of Information Act ("FOIA").

The court below overlooked provisions of the Gun Control Act ("GCA") which protect the privacy of the above records. First, 18 U.S.C. § 923(g)(3)(A) requires licensed dealers to prepare a report whenever the licensee sells two or more handguns to a nonlicensee during a five-day period. The dealer sends one copy to the Secretary of the Treasury (ATF)[2] and another to State or local law enforcement. Section 923(g)(3)(B) provides that, unless the purchaser is a felon or other prohibited person, the State or local law enforcement agency "shall not disclose any such form or the contents thereof

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brief is filed with the written consent of all parties.

[2] The Secretary has delegated his authority to administer and enforce the Gun Control Act to the Bureau of Alcohol, Tobacco and Firearms ("ATF" or "BATF").

to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received."

Having prohibited law enforcement agencies from disclosing such information to *any* entity – which would include the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available to anyone via FOIA.

Moreover, the Secretary is not authorized to disclose to the public information from the records of licensed dealers, including that generated for tracing firearms. The Firearms Owners Protection Act, P.L. 99-308, 100 Stat. 449 (1986) ("FOPA") enacted § 923(g)(1)(D), which authorizes the Secretary to "make available to any Federal, State, or local law enforcement agency" information from licensee records "with respect to the identification of persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received" such items. No authorization exists to disclose such information – much less information on non-prohibited persons – to the public.

Indeed, to the extent such records involve tracing firearms, the Secretary himself may have access to these records only when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." §§ 923(g)(1)(B)(iii) & (g)(7). Congress did not intend that records to which the Secretary may not access except for bona fide criminal investigations are subject to public disclosure.

Further, FOPA also amended § 926(a) to prohibit the Secretary from adopting any regulation requiring that licensee records "or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, is subject to disclosure to the public.

The Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), prohibits ATF from expending funds "in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees . . . ." Yet the lower court held that such records, when they concern multiple handgun sales or traces, are subject to disclosure to the public.

In claiming that "one does not possess any privacy interest in the purchase of a firearm," 287 F.3d at 636, the court of appeals also ignored yet another statutory scheme – the Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993) ("Brady Act"). The Brady Act directed the Attorney General to establish the national instant criminal background check system ("NICS") to determine whether persons may lawfully receive firearms from federally-licensed dealers. Section 103(h) provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."

Two critical provisions of the Act serve to protect privacy interests.

First, the Act created 18 U.S.C. § 922(t)(2), which provides that, if NICS (which is administered by the FBI) determines that a person may lawfully receive a firearm, NICS shall assign a unique number to the transaction, provide the number to the dealer, and "destroy all records of the system with respect to the call" (other than the number and the date) and "all records of the system relating to the person or the transfer."

Second, § 103(i) of the Act provides that no federal agency may (1) "require that any record" generated by NICS "be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof," or (2) use NICS "to establish any system for the registration of firearms, firearm owners, or firearm transactions," except of ineligible persons.

Every purchase of a firearm from a licensed dealer is subject to the above Brady Act procedures and privacy protections. Persons who purchase more than one handgun in a five-day period as well as persons who purchase a firearm and whose identity later appears in a trace report are subclasses of the larger class of firearm purchasers who have passed the instant background check and to whom the above privacy protections apply. The only exception is in regard to an unlawful purchaser.

In short, the federal instant background system must destroy all records of the identities of lawful firearm purchasers and may not record any information on such persons at any federal, State, or local facility. It could hardly be the case that Congress intended such information to be available to the City of Chicago or the general public via the FOIA.

Despite their claim that some records are exempt from disclosure, the Petitioner disclosed to the City of Chicago records of multiple sales and traces which took place in that jurisdiction, and routinely discloses to any requester on zip disks limited records of multiple sales and traces after two and five years respectively. These disclosures violate the privacy protections of the GCA, which are thereby exempt even from discretionary disclosure under Exemption 3, as they are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

Even absent the above GCA provisions, the information is not subject to disclosure. The purpose of FOIA to expose the performance of government agencies to public view "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *U.S. Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989).

Unless the judgment of the court of appeals is reversed, information on countless firearm purchasers will be disclosed in violation of their privacy interests established by law.

ARGUMENT

Introduction

This case implicates the privacy interests of millions of Americans who chose to own firearms.[3] The parties failed to bring applicable statutory provisions protecting those privacy interests to the attention of the court of appeals, which decided this case without reference thereto.

The court of appeals held that "the City seeks records pertaining to gun buyers and sellers. . . . [O]ne does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). The court also decided that "every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. . . . As a result, there can be no expectation of privacy in the requested names and addresses." *Id.* at 637.

The statutory scheme is completely to the contrary. The lower court overlooked the following statutes set forth in the Gun Control Act of 1968 ("GCA"), as amended: 18 U.S.C. § 923(g)(3) (records of multiple handgun sales received by State or local law enforcement may not be disclosed and must be

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[3] *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) ("owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm . . . .").

destroyed within 20 days of receipt); § 923(g)(1)(D) (licensee records may be disclosed to law enforcement agencies only regarding persons ineligible to possess firearms); §§ 923(g)(1)(B)(iii) & 923(g)(7) (licensee records available for tracing are limited to a "bona fide criminal investigation"); and § 926(a) (licensee records may not be transferred to any federal, State, or local facilities, and firearms, firearm owners, and firearm transactions may not be registered).[4] Finally, "[t]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989).[5]

For its assertion that it is "well established" that firearm purchasers have no privacy rights, the court of appeals relied on a single district court opinion which also failed to mention any

[4] NRA sought to bring these provisions to the attention of the court of appeals, but that court, without explanation, denied NRA's unopposed motions to file amicus curiae briefs in the appeal and in the petition for rehearing en banc. Orders dated July 23, 2001, and June 26, 2002.

[5] "This type of privacy interest in which individuals seek to keep information from the general public while simultaneously divulging it for limited purposes to others is not unusual. Of course, FOIA's privacy exemption is a prime example: individuals divulge personal information to the government for limited purposes with the expectation that the information will not become available to the general public." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000).

of the above statutory provisions.[6] The court of appeals held that records kept by federally-licensed firearm dealers of two kinds are subject to disclosure: records reporting multiple handgun sales, and records compiled in the tracing of firearms.

I. CONGRESS INTENDED THAT REPORTS OF MULTIPLE HANDGUN SALES BE CONFIDENTIAL

Records of multiple handgun sales are addressed by 18 U.S.C. § 923(g)(3)(A), which provides that licensed dealers shall prepare a report of any sale of two or more pistols or revolvers to a nonlicensee in a five-day period.[7] The dealer forwards the report to the Secretary and also "to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction" where the sale took place. Section 923(g)(3)(B) provides:

[6] 287 F.3d at 636-37, citing *Center to Prevent Handgun Violence v. U.S. Dept. of Treasury*, 981 F. Supp. 20, 23 (D. D.C. 1997). The court of appeals also cites *United States v. Biswell*, 406 U.S. 311 (1972), but that case only upheld regulatory inspections of licensee records and had nothing to do with the disclosure thereof to the public. Indeed, *Biswell* held that firearms dealers have "justifiable expectations of privacy." *Id.* at 316.

[7] This is a mere reporting requirement – such multiple handgun sales are lawful. As explained *infra*, transfers are made only after the national instant criminal background check system ("NICS") verifies that the purchaser is eligible to receive a firearm, after which NICS must destroy all records related to the person and the transfer. 18 U.S.C. § 922(t).

> Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm,[8] the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received.[9]

The above provision was an amendment to the GCA enacted as part of the Brady Act.[10] Senator Dole, sponsor of this amendment, explained that it "requires that no record can be kept at the State and local police departments, which eliminates the concern that this would be back door gun registration." 139 Cong. Rec. S16311 (Nov. 19, 1993).

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[8] These provisions prohibit convicted felons and certain other limited classes of persons from receiving a firearm.

[9] Section 923(g)(3)(B) continues that once every 6 months:

> the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.

[10] Other Brady Act privacy provisions are set forth *infra*.

Having prohibited law enforcement agencies from disclosing information of multiple handgun sales to any entity – which would include the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available for the asking by anyone via the FOIA.

The court of appeals simply disregards § 923(g)(3)(B) and finds no individual privacy interests in multiple sales reports. Yet this is plainly information that Congress, as a matter of law, intended should be private.

II. TRACE RECORDS AND OTHER INFORMATION FROM LICENSEES MAY BE DISCLOSED ONLY TO LAW ENFORCEMENT AGENCIES AND ONLY IN REFERENCE TO UNLAWFUL PURCHASERS

The Secretary is not authorized to disclose to the public information from the records of licensed dealers, including information generated for tracing firearms. Indeed, subject to limited exceptions, the Secretary is himself prohibited from retaining records of firearm transactions.

As originally enacted in the GCA, § 923(g) allowed the Secretary to "make available to such State or any political subdivision thereof, any information . . . with respect to the identification of persons . . . who have purchased or received

firearms or ammunition." P. L. 90-618, 82 Stat. 1213 (1968).[11] Among the many reforms seeking to protect the privacy of law-abiding citizens, FOPA, 100 Stat. at 455, repealed that provision and enacted § 923(g)(1)(D), which provides in part:

> The Secretary may make available to any Federal, State, or local *law enforcement agency* any information which he may obtain by reason of this chapter with respect to the identification of *persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition*, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency. (Emphasis added).

Thus, the only information from licensee records which

[11] The full text of the original § 923(g) was as follows:

> Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

the Secretary may disclose to a local law enforcement agency concerns felons and other prohibited persons. Nothing in § 923(g)(1)(D) authorizes disclosure to the public of this information, much less information about non-felons.

Moreover, the requirement that the Secretary may obtain information from dealer records to trace firearms only for a bona fide criminal investigation further establishes the confidentially of dealer records. Section 103 of the FOPA, 100 Stat. at 454, amended § 923(g)(1)(B)(iii) to authorize the Secretary to inspect licensee records for tracing only "when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." Similarly, Section 11036 of the Crime Act of 1994, P.L. 103-322, 108 Stat. 1796, enacted § 923(g)(7), which provides:

> Each licensee shall respond immediately to . . . a request by the Secretary for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

The above provisions establish that the Secretary's only authority to disclose records of firearms purchases relating to traces is to a law enforcement agency and then only as it relates to a person *prohibited* from receiving a firearm but who received a firearm. It cannot be reasonably argued that records which the Secretary may obtain only in a bona fide criminal investigation and may make available only to law enforcement

agencies are somehow transmogrified by the FOIA into public records.

United States v. Marchant, 55 F.3d 509, 516 (10th Cir. 1995), which involved disclosure to local law enforcement of a transfer form (Form 4473) falsified by a felon, commented about the above amendments:

> This legislative distinction between law-abiding citizens and persons prohibited from possessing or receiving firearms under 922(g) is central to the FOPA amendments . . . . Further, although *Congress restricted the BATF's ability to release information obtained from ATF Form 4473s to state or local law enforcement agencies*, FOPA authorized the BATF to release "any information . . . with respect to the identification of persons prohibited from purchasing or receiving firearms." [. . . 18 U.S.C. 923(g)(1)(D).] FOPA, therefore, allowed the BATF to release information regarding prohibited persons such as Defendant without regard for privacy or confidentiality. (Emphasis added.)

Even before the FOPA amendments, "Section 923(g) of the GCA did not grant unrestrained access to ATF Form 4473s to other law enforcement agencies or the public at large." *Id.* at 515. Under either version, the public at large had *no* access to any such information. Yet the court of appeals here holds that information originating from licensee records must be given

out to the public at large through the mere filing of a FOIA request.

Section 923(g)(1)(D) authorizes the Secretary to disclose certain information *only* to a law enforcement agency, not a municipality such as the City of Chicago. The information authorized to be released is obtained from the records of licensed dealers, which would include trace information, but only insofar as the records concern the identification of persons prohibited from firearm receipt who have received firearms. The information may include a description of the firearm. Clearly, the Secretary is *not* authorized to make available information from a dealer's records about persons who are *not* prohibited or about the firearms they purchase. This lack of authority to disclose records exists without regard to whether the information is compiled for tracing purposes.

The above is further confirmed by the legislative history. Senate Report 98-583, 98th Cong., 2d Sess., 16 (1984),[12] reinforces that the provision authorized the Secretary to release information, but only about prohibited persons:

> The Secretary is authorized to share with Federal, state, and local law enforcement

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[12] "There was no Senate Report on Pub.L. No. 99-308 [i.e., FOPA]. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n* v. *Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991).

> agencies information obtained under Chapter 44 which relates to the identification of prohibited persons who have purchased or received firearms or ammunition, and a description of items purchased. He may provide information contained in records maintained under Chapter 44 when requested by any such agency.

The Senate report further explained that it sought to meet law enforcement needs while "reduc[ing] the potential for unwarranted intrusions into the business affairs of law-abiding licensees." *Id.* at 18. It added:

> However, the Committee wishes to emphasize that, notwithstanding any other provision of law, the authority granted under 18 U.S.C. 923(g) (3), (4) and (5), as well as that contained in paragraph (1), as amended, are not to be construed to authorize the United States or any state or political subdivision thereof, to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.[13]

[13] During debate, Senator Orrin Hatch, the FOPA floor manager, compared the old and new provisions, explaining that "Existing law" provided in part: "Any record information identifying purchasers and obtained by the Secretary may be furnished to State and local officials . . . ." FOPA would provide: "No regulation issued after effective date may require that records or their contents be transferred to a Government facility

Id.

In fact, FOPA enacted that very prohibition into law. Section 106 of FOPA, 100 Stat. 459-60, amended § 926(a) to provide:

> The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . . No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation. (Emphasis added.)[14]

or that any system of firearms registration be established." 131 Cong. Rec. S5352 (May 6, 1986).

[14] As noted, the above proscribes recordation of "any" portion of a record and "any" registration system. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Thus, while the Secretary retained the authority to trace firearms, no licensee records – which includes the contents of trace records – may "be recorded at or transferred to a facility owned, managed, or controlled by . . . any State or any political subdivision thereof."[15] Moreover, the privacy interests include not just the "firearms owners" but also the "firearms" and "firearms transactions or dispositions." FOPA chief sponsor Senator McClure further explained:

> The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments.[16]

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[15] "The authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." 131 Cong. Rec. S8691 (June 24, 1985) (statement of Senator Orrin Hatch). When the bill was pending, the Administration proposed the insertion of "any centralized system of registration." Federal Firearms Owner Protection Act: Hearings on S. 914 before Sen. Judiciary Comm., 98th Cong., 1st Sess., 11, 42 (1983) (testimony of Robert E. Powes, Deputy Assistant Secretary for Enforcement, U.S. Dept. of Treasury, attaching proposed amendments). As enacted, § 926(a) broadly prohibited "*any* system of registration," clarifying that FOPA prohibits use of licensee records for any registration system, whether local or centralized.

[16] *See* 18 U.S.C. § 923(g)(1)(A) (licensee shall maintain records of firearm dispositions); 27 C.F.R. § 178.124(c) (record includes transferee's identity and firearm description) & § 178.129(b) (records kept for 20 years).

131 Cong. Rec. S9163-64 (July 9, 1985).

It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, could be freely available under FOIA to "any State or any political subdivision thereof" and to the general public. That such information is not subject to disclosure is mandated not only by such specific language, but also by the legislative purpose to protect what Congress perceived to be the rights of firearm owners, not the least of which was privacy.[17] The

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[17] The preamble to FOPA expresses this intent clearly:

> CONGRESSIONAL FINDINGS--The Congress finds that--
> (1) the rights of citizens--
> (A) to keep and bear arms under the second amendment to the United States Constitution;
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

§1 (b), P.L. 99-308, 100 Stat. 449 (1986).

decision of the court of appeals is inconsistent with this Congressional purpose.

There is yet another source of law which provides for the confidentiality of records of firearms transfers. The Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), provides appropriations:

> for necessary expenses of the Bureau of Alcohol, Tobacco and Firearms .... *Provided further*, That no funds appropriated herein shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, *or any portion thereof*, of acquisition and disposition of firearms maintained by Federal firearms licensees .... (Emphasis added).

This appropriations rider has been passed annually since 1978.[18] It was first enacted to negate ATF's proposed regulation that licensees must submit to the Director a quarterly report of firearms dispositions. 43 F.R. 11,800 (March 21,

[18] *See* P.L. 95-429, 92 Stat. 1001, 1002 (1978). The phrase "or any portion thereof" was added by P.L. 103-123, 107 Stat. 1229 (1993).

1978). The regulation would have provided in part: "Dispositions to nonlicensees shall include the date of disposition and firearm description, but the report shall not contain the name and address of the nonlicensee." *Id.* The report would "focus upon the particular firearm and licensed dealer involved in a particular transaction but would not identify the purchaser." Treasury's Proposed Gun Regulations: Hearings before Subcommittee on Crime, House Judiciary Committee, 95th Cong., 2d Sess., 266 (1979).

In enacting the appropriations rider to prohibit the above, Congress thereby sought to protect the privacy not only of the transferee's identity, but also of the firearm description and the dealer who transferred it, which are within the terms "any portion thereof" of the acquisition and disposition records. Yet those are exactly the pieces of information that the court of appeals here finds not to not to be protected by any privacy interest and may be disclosed to the general public.

In sum, Congress has enacted strict privacy protections for information in licensee records on not only firearm owners, but also firearms and firearms transactions. It authorized the Secretary to obtain information from licensee records for tracing purposes only in relation to bona fide criminal investigations. It authorized the Secretary to give information from licensee records to state and local law enforcement agencies, but only in regard to prohibited persons who received firearms. Given these strict constraints, Congress could not have intended that the public at large could have access to these records on demand through FOIA.

III. THE BRADY ACT PROTECTS THE PRIVACY OF FIREARM TRANSFERS

In claiming that "one does not possess any privacy interest in the purchase of a firearm," 287 F.3d at 636, the court of appeals also ignored yet another statutory scheme – the national instant criminal background check system ("NICS") established by the Brady Act. The Brady Act directed the Attorney General to establish the NICS to determine whether persons may lawfully receive firearms from federally-licensed dealers.[19] Section 103(h) provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."[20] Two critical provisions of the Act serve to protect privacy interests.

[19] The NICS is the Permanent Provision which was created in 1998. The Interim Provision required the purchaser to complete a statement of identification and required local chief law enforcement officers ("CLEOs") to conduct background checks. It further provided that the CLEO must, within 20 days, "destroy the statement, [and] any record containing information derived from the statement" and mandated that "the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection." 18 U.S.C. § 922(s)(6)(B). This destruction requirement was intended "to help protect the privacy of legal purchasers." 139 Cong. Rec. H9117 (Nov. 10, 1993) (statement of Rep. Hughes).

[20] NICS is administered by the Federal Bureau of Investigation and by such States (called "points of contact") as choose to participate. *See* 28 C.F.R. Part 25.

First, the Act provides that a licensed dealer may not transfer a firearm to a non-licensee without having contacted NICS for a background check. It then provides, 18 U.S.C. § 922(t)(2), the following three duties for the NICS:

> If the receipt of a firearm would not violate section 922(g) or (n) or state law, the system shall–
>
> (A) assign a unique identification number to the transfer;
>
> (B) provide the licensee with the number; and
>
> (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.[21]

Second, further to secure privacy interests, § 103(i) of the Brady Act provides:

[21] Appropriations riders for several years now have provided: "None of the funds appropriated pursuant to this Act or any other provision of law may be used for . . . (2) any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm." *See* § 618 of the Departments of Commerce, Justice, & State, the Judiciary, & Related Agencies Appropriations Act, 2002, P.L. 107-77, 115 Stat. 748 (2001).

PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS-- No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code or State law, from receiving a firearm.[22]

Every purchase of a firearm from a licensed dealer is subject to the above Brady Act procedures and privacy

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[22] Senator Stevens explained about this provision, 135 Cong.Rec. S8934 (June 27, 1991):

> My amendment will not permit the registration of either a gun or a gun owner. In fact, the amendment specifically prohibits keeping any records about lawful sales. This will eliminate the possibility of an assembly of gun registration lists by local, State, or Federal authorities.

protections. Persons who purchase more than one handgun in a five-day period as well as persons who purchased a firearm and whose identity later appears in a trace report are subclasses of the larger class of firearm purchasers who have passed the instant background check and to whom the above privacy protections apply.

In short, the federal instant background system must destroy all records of the identities of lawful firearm purchasers and may not record any information on such persons at any federal, State, or local facility. It could hardly be the case that Congress intended such information to be available to the City of Chicago or the general public via the FOIA.

IV. ATF'S "DISCRETIONARY" DISCLOSURES ARE PROHIBITED BY LAW

In the courts below, Treasury and ATF failed to refer to any of the privacy protections afforded by the Gun Control Act. Only when the case reached this Court did the Solicitor General refer to these provisions. *See* Pet. 17 (citing § 926(a)); Reply Br. 4 n.1 (citing § 923(g)(3)).

The agency, at both administrative and litigation stages, failed to rely on FOIA Exemption 3, which exempts matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). *See Administrator v. Robertson*, 422 U.S. 255, 264 (1975) (FOIA "in no way limits statutes specifically written with the congressional intent of curtailing the flow of

information as a supplement necessary to the proper functioning of certain agencies") (statement of Sen. Long). An agency may not make a discretionary FOIA disclosure within the scope of Exemption 3.[23]

ATF improperly disclosed records which are confidential under the GCA. The City of Chicago is engaged in civil litigation against the firearms industry.[24] The Petition relates:

> In furtherance of that litigation, the City made a FOIA request for access on CD-ROM to ATF's Trace and Multiple Sales Databases. . . . ATF provided respondent all data related to (a) traced firearms associated with crimes committed in Chicago and (b) multiple sales purchasers who are residents of Chicago, as a discretionary release to a local law enforcement agency pursuant to the Gun Control Act of 1968. See Pet. App. 3a-4a; 18 U.S.C.

[23] *Ass'n. of Retired Railroad Workers, Inc. v. U.S. Railroad Retirement Bd.*, 830 F.2d 331, 335-36 (D.C. Cir. 1987). *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187 (8th Cir. 2000) ("if the petition is within the exemption, then USDA surely cannot release it under its discretionary release regulation"); *Sherman v. U.S. Dept. of Army*, 244 F.3d 357, 364 (5th Cir. 2001) ("only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests when they are threatened by an FOIA request").

[24] *See City of Chicago v. Beretta U.S.A. Corp.*, 2002 WL 31455180 (Ill. App. 2002) (holding that lawful manufacture and distribution of firearms may be public nuisance).

923(g)(1)(D).

Pet. 6-7; *see also* Pet. 14 n.8.

Yet § 923(g)(1)(D) provides for release of records only to a "local law enforcement agency," not to a "political subdivision" – language which FOPA repealed. That political subdivision requested the records for civil litigation, not law enforcement. Further, the records are restricted to "persons prohibited from purchasing or receiving firearms . . . who have purchased or received firearms," which excludes innocent purchasers whose names appear in traces (*e.g.*, victims of gun theft) and lawful multiple sales purchasers.

ATF's above "discretionary release" of records was also inconsistent with § 923(g)(3)(B), which provides that the "local law enforcement agency of the local jurisdiction shall not disclose any such [multiple sales] form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received." The only exception is "regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm."

Moreover, ATF's general FOIA policy of releasing the above records over time to any requester cannot be squared with the above statutes. After two years, ATF releases the Multiple Sales Database, including firearm information (manufacturer, type, serial number and caliber); and dealer

identification, and excluding individual names and addresses of retail purchasers. Pet. 6. After five years, ATF releases from the Trace Database, *inter alia*, firearm data (serial number, if the firearm was involved in multiple sales, and manufacturer/importer name), firearms dealer identification data, and date of retail purchase. Names and addresses of private individuals are withheld. Pet. 5.

Even with the deletion of personal identities, the above violates the privacy protections of §§ 923(g)(1)(D) and(3)(B). Further, § 926(a) provides that licensee records "or any portion of the contents of such records" may not "be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*," and also prohibits "any system of registration" not just of "firearms owners," but also of "firearms" and "firearms transactions or dispositions." Supplying this information to the public after the passage of time conflicts with the Congressional purpose that this information be private.[25]

To rectify the above, this Court should "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.[26]

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[25] "Confidentiality interests [under exemption 7(C)] cannot be waived through prior public disclosure or the passage of time." *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir.1999).

[26] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979) (remanding for consideration of whether disclosure would violate law);

V. RECORDS OF FIREARM TRANSFERS ARE IRRELEVANT TO FOIA'S CORE PURPOSE

Even absent the GCA provisions, data on firearms, firearm owners, and firearms transactions are not subject to disclosure. The core function of the Freedom of Information Act is "the citizens' right to be informed about 'what their government is up to.'" *Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989). This Court observed:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. *See id.* at 774-75 ("in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.").

Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 780 (D.C. Cir. 1978) (referring to "circumstances where, through pure mistake, the Government attorneys had not invoked the correct exemption in the district court. . . . [U]nder 28 U.S.C. § 2106, the appellate court would have discretion to 'remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.'").

As for Chicago's alleged interest in enforcing its ordinances,[27] "the purposes for which the request for information is made . . . have no bearing on whether information must be disclosed under FOIA." *Bibles v. Oregon Natural Desert Assn.*, 519 U.S. 355, 355-56 (1997).

Given the above statutory scheme, the court of appeals is wrong in its assertion that lawful firearm purchasers have no applicable privacy interests and that their identities and other personal information are subject to disclosure. The Petitioner, focusing on the interests of law enforcement agencies, has set forth additional reasons why this Court should reverse the judgment below.

CONCLUSION

The Court should hold that records of firearm transfers are not subject to disclosure under the Freedom of Information Act and reverse the judgment of the court of appeals.

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[27] "Even if we were to find a minimal privacy interest in this information, it is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *City of Chicago*, 287 F.3d at 637.

Respectfully submitted,

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